FOR ARGUMENT

No. 79-703

In the
Supreme Court of the United States
OCTOBER TERM, 1979

BERNARD CAREY, as State's Attorney of Cook County, Illinois,

Appellant,

vs.

ROY BROWN, et al.,

Appellees.

Appeal from the United States Court of Appeals for the Seventh Circuit.

BRIEF AMICUS CURIAE OF ROGER BALDWIN FOUNDATION OF ACLU, INC.

HOWARD EGLIT
KAREN POPEK
DAVID GOLDBERGER
Roger Baldwin Foundation
of ACLU, Inc.
5 South Wabash Street
Suite 1516
Chicago, Illinois 60603

The Scheffer Press, Inc.—(312) 263-6850

INDEX

PAGE

TABLE OF AUTHORITIES

Cases

PAGE

Statutes

Other Authorities

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 79-703

BERNARD CAREY, as State's Attorney
of Cook County, Illinois,

Appellant,

vs.

ROY BROWN, et al.,

Appellees.

Appeal from the United States Court of Appeals
for the Seventh Circuit.

BRIEF AMICUS CURIAE OF ROGER BALDWIN FOUNDATION OF ACLU, INC.

INTEREST OF THE AMICUS CURIAE*

The Roger Baldwin Foundation of ACLU, Inc., is a non-profit, non-partisan organization dedicated to the defense and affirmative protection of the constitutional rights of all persons. It is actively engaged, through litigation, education, and other pursuits, in furthering and vindicating those rights, particularly First Amendment rights, whenever threatened.

---

* The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk of the Court pursuant to Rule 42(2) of the Rules of this Court.

The instant case involves a state law which suppresses constitutional guarantees affecting and governing the rights of freedom of speech and freedom of the people peaceably to assemble and to petition for redress of grievances. Defendant on his appeal challenges and seeks to overturn the Court of Appeals' decision invalidating that statute. *Amicus* believes that the ruling of the Court of Appeals was correct and appears here because of its conviction that only affirmance of that decision will vindicate the First Amendment rights of plaintiffs and all other persons.

SUMMARY OF ARGUMENT

This case, dealing with disparate treatment of picketers in the public forum, is directly governed by *Police Department of Chicago* v. *Mosley,* 408 U.S. 92 (1972). That decision, as well as rulings by this Court both before and since its being handed down, outlaw content-based regulation of protected speech—the vice perpetrated by the statute at issue here.

Even were some regulation of protected speech on the basis of content constitutionally permissible in some circumstances, that regulation is not tolerable here. The numerous exceptions built into the anti-residential picketing statute foreclose the state's claim that householders' privacy interests are served by the law. Moreover, the object of the picketing in this case—the mayor of the City of Chicago—has lesser privacy interests than do private citizens. In any event, there is no 'right' of residential privacy which overrides the First Amendment. Nor does the claimed availability of alternative sites for picketing mitigate the First Amendment and equal protection rights of the picketers to employ the forum they chose—the sidewalk in front of the mayor's residence.

ARGUMENT

I. INTRODUCTION.

The issues now before this Court are hardly novel; indeed, the parallels between *Police Department of Chicago* v. *Mosley,* 408 U.S. 92 (1972), and the instant case are striking. As there was in *Mosley,* so there is here a statute banning picketing at a certain locale. As in *Mosley,* so too here the ban is relaxed in certain circumstances. Both in *Mosley* and here, the critical exception to the ban turns on the nature of the speech uttered by the picketers: in both settings, picketing is allowed when engaged in in pursuit of labor disputes.

A unanimous Court rejected the claim to constitutional legitimacy made for the statute in *Mosley,* with seven Justices joining in the majority opinion. Unless this Court, only eight years later, is now prepared to turn its back on that ruling, a like disposition must follow here. Because *Mosley* was decided in such an eminently correct manner, and because the statute at stake here and the fact situation here so closely track their counterparts in that case, a departure today from *Mosley* could only be described as devastatingly wrong.

II. POLICE DEPARTMENT OF CHICAGO V. MOSLEY CONFIRMS THE UNCONSTITUTIONALITY OF THE ILLINOIS STATUTE, WHICH REGULATES SPEECH ON THE BASIS OF ITS CONTENT.

Police Department of Chicago v. *Mosley* addressed the constitutionality of a Chicago ordinance which prohib-

ited all picketing within 150 feet of a school while the school was in session, but which excluded from this ban peaceful picketing arising out of labor disputes. Mosley, a peaceful picketer, had been arrested for protesting a high school's allegedly racially discriminatory policies.

Because the *Mosley* ordinance provided disparate treatment for different picketing, the Court utilized the Equal Protection Clause of the Fourteenth Amendment as its basis for analysis. Since, however, First Amendment interests were obviously "closely intertwined," 408 U.S. at 95, the Court primarily discussed First Amendment values and relied upon First Amendment decisions as guiding authority. In both equal protection and First Amendment terms, the anti-picketing ordinance in *Mosley* could not withstand constitutional scrutiny, the Court concluding, at 95-96:

> The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. . . . The operative distinction is the message on a picket sign. But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . .
>
> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. . . . Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembly or speaking on the basis of what they intend to say.[1]

In brief, content-based regulation, parceling out the public forum only to those speakers with whom government is in accord, is forbidden.

The *Mosley* Court's language prescribes the ruling which must follow here. The Illinois statute at issue bans residential picketing, save in the instance of "peaceful picketing of a place of employment involved in a labor dispute or the place of holding a meeting or assembly on premises commonly used to discuss subjects of general interest." Ill.Rev.Stat., ch. 38, §21.1-2. The sole basis, then, for the determination of whether allowable picketing of a residence is occurring is the nature of the message being conveyed: if the activity follows from a labor dispute, arising out of employment within or related to the house being picketed, the activity is sanctioned. If the picketing is designed to convey a message of broader social significance, it falls under the proscription of the

---

[1] Mr. Justice Stevens, writing for a plurality in *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 65 (1976), expressed concern that this passage from *Mosley*, if "read literally and without regard for the facts of the case in which it was made, would absolutely preclude any regulation of expressive activity predicated in whole or in part on the content of the communication." Indeed, that comprehension of *Mosley* is correct: content-based regulation *is* forbidden by the First Amendment. But, in any event, here the record is clear that the appellees were seeking to speak on public issues of significant social concern. Thus, certainly the *Mosley* language, "read . . . [with] regard for the facts of the case in which it was made" and with regard to the facts of the instant case, can generate no trepidation based on a perceived misuse of the 1972 decision.

statute. *Mosley* simply does not tolerate such a disparity of treatment.

In reaching this obvious conclusion, it is both easy and appropriate to set aside one correlative, but important, matter to which the *Mosley* Court adverted—e.g., the question of whether there is indeed a public forum even in existence. At first blush, that question evokes the familiar answer articulated by Mr. Justice Roberts in *Hague* v. *CIO,* 307 U.S. 496, 515-516 (1939), setting forth the streets and parks as being from time immemorial dedicated to the public use. But even that broad reading of the public forum can comprehend the fact that situations may exist where a portion of the public arena—at first appearance seeming to be an apt part of the forum available for public debate—is arguably subject to being removed from the speaker's use. *See, e.g., Lehman* v. *City of Shaker Heights,* 418 U.S. 298 (1974); *Cox* v. *Louisiana,* 379 U.S. 559 (1965).

Here, however, there is clearly no basis for doubting that the streets and sidewalks in residential areas have been opened to picketers' use. For on its face, the Illinois statute recognizes that some speakers, at least, may commandeer the environs of a house for their picketing, i.e., picketers of homes involved in labor disputes and of homes employed as places of meeting or assembly. Having admitted statutorily that residences are appropriate sites for peaceful picketing, the state cannot then mandate that only certain picketing—defined by the message conveyed—shall be tolerated in that setting. That much *Mosley,* as already noted, teaches. *See also People Acting Through Community Effort* v. *Doorley,* 468 F.2d 1143, 1146 (1st Cir. 1972).

In sum, because *Mosley* so trenchantly outlaws content-based regulation which cuts into First Amendment exercises, the statute here—struck down by the Court of Appeals—should not be resurrected by this Court. Because the activity engaged in, and the message conveyed, by the appellees here is so firmly in accord with that " 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,' " which the *Mosley* Court endorsed, 408 U.S. at 96, any ruling against the appellees would squarely assault the First Amendment. And because the Illinois statute at issue itself confirms that the streets and sidewalks surrounding residences are a part of the public forum, any belated *post facto* argument to the contrary must fall flat.

III. THE GREAT BODY OF CASE LAW CONFIRMS THAT NEITHER THE FIRST AMENDMENT NOR THE EQUAL PROTECTION CLAUSE TOLERATES CONTENT-BASED REGULATION OF SPEECH.

Mosley hardly stands alone. Earlier cases, as indicated in *Mosley* itself, indeed supported the notion that the Equal Protection Clause, as well as the First Amendment itself, preclude content-based discrimination among speakers in the public forum. More importantly, perhaps, the Court has continued to acknowledge and enunciate this principle since *Mosley.*

In *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205 (1975), the Court held unconstitutional a city ordinance which prohibited drive-in movie theaters from exhibiting films containing nudity when the screen was visible from a public street or place. One of the city's proposed justifications for the ordinance was the protection of the privacy of citizens against unwilling exposure to offensive

material. In response, the Court reasserted the *Mosley* principle that the state "may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of content. . . . But when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power." *Id.* at 209. The Court determined that the city ordinance discriminated against movies solely on the basis of content; such content discrimination could not be justified as being a means to prevent significant invasions of privacy. Chief Justice Burger, in dissent, rightfully characterized the Court's opinion as holding that, regardless of the circumstances, government may not regulate expressive activity on the basis of its content.

In *Hudgens* v. *NLRB,* 424 U.S. 507 (1976), the Court decided in effect that First Amendment rights were inapplicable to private shopping centers. However, the Court, relying on *Mosley,* reemphasized the principle that government may not in any circumstance discriminate on the basis of content in the regulation of expression in a true public forum. *Id.* at 520. More particularly, the Court reaffirmed the principle that *picketing* in a public forum cannot be selectively excluded on the basis of its message.

In another context later the same year, the Court relied heavily on the *Mosley* principle in holding that a school board could not constitutionally prohibit a teacher from speaking at an open public school board meeting. *City of Madison* v. *Wisconsin Employment Relations Commission,* 429 U.S. 167 (1976). Since the board had opened a forum for direct citizen involvement, it could not discriminate between speakers on the basis of the content of their

speech. *See also First National Bank of Boston* v. *Bellotti,* 435 U.S. 765 (1978).

Young v. *American Mini Theatres, Inc.,* 427 U.S. 50 (1976), does not undercut the appellees. There, the Court upheld a Detroit zoning ordinance which only restricted movie theatres exhibiting sexually explicit adult films. A plurality of the Court contended that the ordinance did not violate the Equal Protection Clause despite the fact that theaters were treated disparately, with the differentiation flowing from the content of the films being exhibited. Mr Justice Stevens, writing for this plurality, viewed the speech at issue as being of a uniquely low value, albeit nonetheless speech falling within the ambit of the First Amendment: "it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . . ." 427 U.S. at 70. Thus, the ordinance at issue was upheld, only trenching as it did upon such little valued speech.

Whatever broad implications *Young* may have in other contexts, here it simply does not serve to erode the press of *Mosley.* For one, there is the pragmatic fact that the plurality which adopted an at least two-tiered analysis of protected speech—with some speech clearly falling within the scope of the First Amendment to be accorded lesser protection than other speech—was not, after all, a majority. Mr. Justice Powell concurred, producing a majority of five for the judgment, but he made clear that he rejected the notion that "nonobscene, erotic materials may be treated differently under First Amendment principles from other forms of protected expression." *Id.* at 73. *Mosley's* majority view—rejecting content-based regulation—thus survived *Young,* as the Court's later reliance

upon it in *City of Madison, supra,* and *Bellotti, supra,* confirmed.[2]

Moreover, there can be no question that the speech here is of the very nature which the First Amendment clearly is designed to protect—political speech going to significant public issues of the day. Thus, even were one to embark upon the sort of content-directed analysis employed by the *Young* plurality, that analysis would lead to according appellee's speech the most stringent protection.[3]

---

[2] Even accepting Mr. Justice Stevens' contention that it is after all necessary, and commonplace, to look to speech content to determine whether a given item of expression falls within the ambit of the First Amendment or outside its coverage, *Young, supra,* at 65-69, once it is clear that indeed speech is fully protected, no further content-based treatment can be accorded it.

[3] The majority in *Erznoznik, supra,* did indicate that selective restrictions on the basis of content have been upheld, when the speaker intrudes on the privacy of the home, *see Rowan* v. *United States Post Office Department,* 397 U.S. 728 (1970), or when the degree of captivity makes it impractical for the unwilling audience to avoid exposure, *see Lehman* v. *City of Shaker Heights,* 418 U.S. 298 (1974). *Rowan* is discussed more fully below in terms of the alleged privacy justification for the Illinois statute. It is sufficient to note here that *Rowan* concerned a unique set of circumstances which involved the commercial advancement of material judged to be erotic or sexually provocative by the recipient, which did not prevent an initial communication, which had as a forum the mail rather than the public streets or sidewalks, and which involved a form of communication not readily regulatable by reasonable time, place, or manner restrictions. Moreover, government was being used as the mechanism to effectuate the intrusion upon privacy.

In *Lehman* the Court upheld the validity of a city's policy of barring all political advertisements from city buses while allowing commercial, nonpolitical advertise-

IV. APPELLANT VAINLY CONTENDS THAT CONTENT-BASED REGULATION OF SPEECH IS CONSTITUTIONALLY PERMISSIBLE.

A. Appellant Errs In The Test He Invokes.

Notwithstanding the haplessness of his task, defendant maintains that under *Mosley* a content-related scheme of selective exclusion of picketers is constitutional if it "furthers an important state interest and is carefully tailored to the contours of the particular interest being protected." App.Br., at 11. Not surprisingly, appellant errs.

The test advocated by the appellant is actually the standard, according to *Mosley,* by which content-neutral regulations based on the time, place and manner of picketing are to be scrutinized:

> We have continually recognized that reasonable 'time, place and manner' regulations of picketing may be necessary to further significant governmental interests. . . . Similarly, under an equal protection analysis, there may be sufficient regulatory interests justifying selective exclusions or distinctions among picketers.
>
> *Mosley, supra,* at 98.

---

[3] (Continued)
ments to be displayed. Although the plurality and concurring opinions were concerned about the captive audience on a bus, the essential issue was whether the city had created a public forum and, having done so, thus was forbidden to discriminate on the basis of the subject matter of the advertising. The plurality opinion noted that the city bus system had never accepted any political or public issue advertising and thus no First Amendment forum had been created. 418 U.S. at 304. Here, of course, the streets have long been a forum; and, what is more, the statute itself recognizes them as a forum for picketing.

Such justifications for selective exclusions must be "carefully scrutinized" and "tailored to serve a substantial governmental interest." *Id.* at 99. But—and here is the juncture at which appellant goes astray—the Court continued in *Mosley,* at 99:

> In this case, the ordinance itself describes impermissibly picketing not in terms of time, place and manner, but in terms of subject matter. The regulation 'thus slip[s] from the neutrality of time, place and circumstance into a concern about content.' This is never permitted.

B. Even Were Some Regulation—In Some Conceivable Context—Allowable, It Would Not Be So Here.

For the sake of argument, one could pursue the contention made by the appellant—i.e., that some regulation is feasible under the Constitution, so long as the state has an important interest and that the statute deployed to pursue that interest is narrowly drawn. Even accepting the assertion as it stands, the statute at issue here fails to meet its measure. The state simply has no important interest—or at least it has no interest important enough to override the First Amendment interests of residential picketers. Nor, even assuming such an interest could be shown on the part of the state, is the statute sufficiently narrowly constructed.

1. The Statute's Own Exceptions Debunk The Privacy Interest Purportedly Being Served.

As an immediately dispositive matter, it is simple enough to point to the Illinois statute itself as demonstration of the sterility of appellant's position. The statute specifically permits "peaceful" picketing of residences, in several defined instances: when the picketing is pursued by

the owner of the house being picketed; when the picketing is directed to a residence which is "a place of employment involved in a labor dispute;" and when the residence is "the place of holding a meeting or assembly on premises commonly used to discuss subjects of general public interest."

Given this parade of statutory exceptions, it is virtually an exercise in pushing a legal camel through a needle's eye to contend that somehow this Illinois statute serves an important state interest in protecting residential privacy. If indeed there were a privacy interest being served, the statute's own exceptions reveal how unimportant the state actually deems that interest to be. Alternatively, the exceptions may actually reveal that the state really does not perceive householders as having privacy interests—a revelation equally as devastating to appellant's argument here. Peaceful picketing to convey issues of broad social and political significance can hardly, simply by its content, intrude upon a non-existent privacy interest or, alternatively, create any greater disruption of privacy than does other peaceful picketing rendered acceptable under the statute.

In brief, the privacy argument propounded by the appellant is, simply on the basis of the statute itself, meritless. The logic of *Mosley, supra,* confirms this. The apt reasoning of the Court of Appeals below in this case confirms this. Indeed, the reasoning of this Court just this Term in *Village of Schaumburg* v. *Citizens for a Better Environment,* ..... U.S. ....., 48 L.W. 4162 (February 20, 1980), supports this conclusion.

In *Citizens for a Better Environment* the Court struck down as unconstitutionally overbroad a village ordinance which prohibited the door-to-door or on-street solicitation of contributions by charitable organizations that do not

use at least 75 percent of their receipts for charitable, non-administrative expenses. Charitable solicitations lie clearly within the protection of the First Amendment; among the justifications offered by the Village for its restriction of this protected expressive activity was its claimed interest in the residential privacy of its citizens.

The Court found this interest in residential privacy only indirectly served by the suppression of the solicitors' First Amendment activity because residents were disturbed equally by solicitors meeting the 75 percent requirement as by those who did not satisfy the requirement. 48 L.W. at 4166. Similarly, in the case at bar residents of a city will be equally disturbed—or not disturbed—by peaceful labor picketers in front of their dwellings as by peaceful non-labor picketers like the appellees. Additionally, the Court in *Citizens for a Better Environment* observed that the ordinance was not directed at unique privacy rights of persons in their residences since it also banned solicitations on public ways. In a sense there are similarly no unique privacy rights at issue here. Although picketing may be directed at a particular residence, picketers may also be attempting to communicate their message to neighbors and passers-by. Indeed, the appellees here wished to express their views on busing to the mayor's neighbors in order to stress the neighborhood character of the busing issue. (A. 18a, 20a). There is thus no unique residential privacy right served by the statute.

2. Public Officials Have A Lesser Claim To Privacy Than Do Private Citizens.

A second aspect of the case before the Court makes the privacy argument a particularly inapt one. The object of the picketing in this situation was the then-mayor of the City of Chicago. The message being conveyed focused on

the problem of segregated schools in the City—a problem which has received consistent media attention and, perhaps more importantly, consideration by the United States Department of Justice. There are a number of reasons why the statute, as applied to these appellees, who were picketing the home of a public official, is particularly offensive.

The statute recognizes, as must the appellant as well, that the state cannot foreclose residential picketing when the residence is also a place of employment and thus the locus of a labor dispute. Indeed the appellant concedes that "by the mere act of bringing a worker into his home, the resident voluntarily dilutes his entitlement to total residential privacy, and the state's interest in legislatively protecting that privacy logically diminishes *vis a vis* the worker and others who may wish to communicate with or about the worker." App. Br., at 22. In sum, "(a)llowing that worker or a labor organization to picket the resident when a labor dispute arises permits an intrusion upon residential privacy that the resident has invited upon himself." *Ibid.*

To the extent that this argument—embodying a notion of waiver of privacy interests by the object of the picketing—has any validity, it can only sustain the appellees in their attack upon the statute. For, by voluntarily choosing to enter the public political arena, the public official—specifically, the mayor of the City of Chicago—necessarily and properly chose to subject himself to the voters' scrutiny, to approbation by the public as well as censure. After all, a public official is exactly that—a *public* official. He too, then, sacrifices his claims to privacy.

This is not to suggest that public officials are totally exposed to the public eye, so that every private act is to

be unclothed for public discussion. It is to say, however, that if the appellant can seriously contend—in a desperate effort to save his privacy argument while also explaining the exception-ridden statute which purportedly protects privacy—that a consumer waives his privacy by employing a television repairmen who subsequently pickets his house because the consumer, dissatisfied with the job, refuses to pay the bill, then certainly all the more is it legitimate to conclude that a public official waives his privacy of the home by assuming a public office.[4] Thus, no important state interest can legitimately be said to be served here, by a statute which cloaks the public officer with undeserved protection, while leaving exposed the hapless householder who employed a subsequently disgruntled plumber or window-washer.[5]

---

[4] In decisions concerning civil liability for defamation or the tortious invasion of privacy, the Court has indicated that the privacy claim of government officials and public figures is weaker than that of the ordinary citizen. *See, e.g., Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967); *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964. *Cf. Time, Inc.* v. *Hill,* 385 U.S. 384 (1967).

[5] It might be contended that even assuming the public official waived his right of privacy, his neighbors did not. And at least some of them might be disaffected by picketers outside their neighbor's house, in plain view of their own houses. This certainly is not a concern to appellant, who willingly concedes that labor picketing directed at a residence is acceptable. No more can it be a concern when it is the public official who is being picketed, and it is *his* neighbors who object. Their claim is no more valid than their complaint about anyone using the streets whom they do not like. The streets are a public forum, and personal idiosyncracies of homeowners, not the object of picketing, cannot close that forum. In any event, the statute is not narrowly drawn so as to except employers or public officials from its ban, while extending protection to their neighbors.

3. There Is No Right Of Residential Privacy Overriding The First Amendment.

Rowan v. *United States Post Office Dep't,* 397 U.S. 728 (1970), is a key case in appellant's argument. It proves to be a weak link on which to build a brief. The *Rowan* Court upheld a federal statute which provided a procedure whereby a householder who found to be "erotically arousing or sexually provocative" material offered for sale in advertisements received through the mail could request that all future mailings from that mailer be stopped. The Post Office would comply with that request.

From this decision appellant extracts the contention that the Court therein "established beyond cavil the right of residential privacy as endowing the resident with the power to censure all uninvited communications". App. Br., at 19.[6] The statement is so overblown as to be silly

---

[6] The cases relied upon by the appellant for this overstatement simply do not support it. In *Cohen* v. *California,* 403 U.S. 15 (1971), the Court acknowledged that the "government may properly act in *many* situations to prohibit intrusions into the privacy of the home of unwelcome views and ideas which cannot be totally barred from the public dialogue. . . ." *Id.* at 21 (emphasis added). Not only did the Court refuse to say that *all* unwelcome communications can be banned from the home; it also refused to exclude messages directed into the home from the general test to be employed to determine whether the government may constitutionally ban such discourse —that there must be "a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Id.*

Erznoznik v. *City of Jacksonville,* 422 U.S. 205 (1975), also cited by the appellant, simply does not support the proffered statement at all. Rather, *Erznoznik* held that government may not selectively exclude certain speech from the public forum on the basis of its content. At most, *Erznoznik* refers to *Rowan* v. *United States Post*

on its face. A homeowner may be irritated by noisy children playing across the street, or by his neighbor's son's motorcycle, or by a fruit tree across the way which offends some peculiar bias against pears or peaches. The appellant would have it that inasmuch as each of these communications—the noise of the children, the noise and sight of the motorcycle, the sight and smell of the fruit tree—is uninvited, the householder has a constitutional right to "censure" it, whatever that means. No further exposition is needed on this point.

More sophisticated bases exist, as well, to demonstrate the narrowness of *Rowan,* and its irrelevance here. In *Rowan,* it was a government agency which was the mechanism for effectuating the intrusion into the home. The federal statute simply gave the homeowner the option to place that agency in a neutral position, by instructing the agency not to deliver the offensive material. Thus, *Rowan* did not involve a situation where government actively undertook to assert a privacy interest on behalf of the homeowner and thence punish anyone who infringed that interest. Rather, it simply sanctioned govern-

[6] (Continued)
Office Dep't, 397 U.S. 728 (1970), which the *Cohen* opinion also cited, as its one example in which the privacy interests of the home prevailed over unwelcome communications. *See Erznoznik, supra,* at 209. *Rowan,* however, did not forge a *per se* rule that all unwelcome communications can be barred from the home.

The final case relied on by the defendant, *Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. 85 (1977), is simply inapposite. The Court observed that the ordinance at issue banning the display of "For Sale" signs in front of residences did not restrict a means of communication which intruded on the privacy of the home or which confronted a captive audience. *Id.* at 94.

ment standing aside from the speaker-listener relationship.

It was in *Martin* v. *City of Struthers,* 319 U.S. 141 (1943), that the Court addressed, and struck down, an activist government attempt to override the First Amendment in the name of privacy of the home. Here, as in *Martin,* there is an undifferentiated effort by non-neutral government to protect all homeowers, whether they desire that protection or not, from the assumedly intrusive messages which speakers seek to deliver. The Illinois statute does not parallel *Rowan,* then: there is no prior history here of government effectuating an intrusion, and government thence simply being requested to cease its support of that intrusion. Rather, the Illinois statute represents active governmental assault upon the First Amendment—an assault for which no precedent exists, and which *Martin* precludes.

This distinction between *Rowan* and the present case, apart from being obvious, is also significant. In *Rowan,* the statute allowed each individual to exercise his First Amendment right to not listen—a right as valuable as that of the speaker to speak. Here, in contrast, the statute casts the state in the role of censor; allows the state to presume that there are no willing listeners; and thence allows the state to punish all those who would speak (with the exception of certain, selected speakers upon whom the state, through its statute, has placed a beneficent hand). *Rowan* preserves First Amendment rights; the statute here destroys them.[7]

[7] It should also be noted that in *Rowan* the material involved was commercial speech concerning erotic material. At the time *Rowan* was decided commercial speech had not yet been declared to be within the ambit of the

Underlying the concern for the privacy of the householder is the perception that the homeowner is a captive audience, in a sense. He is the forced recipient of a message which he cannot escape. While the captive audience plight—as an abstract problem—is a sympathy-arousing one, it is not dispositive here. For unlike the bus passenger forced to submit to a speech from which there is no escape, *see, e.g., Public Utilities Commission* v. *Pollak,* 343 U.S. 451 (1952), or the home-dweller bedeviled by loud and raucous loudspeaker trucks whose intruding noise cannot be eluded, *Kovacs* v. *Cooper,* 336 U.S. 77 (1949), the object of residential picketing is free to censor the message he does not want to receive. He need only draw his drapes; he thereby can avoid the sight he dislikes. He is not being intruded upon in "an essentially intolerable manner." *Cohen* v. *California,* 403 U.S. 15, 21 (1971).

Moreover, it is not claimed here that the First Amendment extends beyond peaceful picketing—the type of activity engaged in by appellees here, in which no intrusive noise penetrates the household. Peaceful residential picketing, then, at most invokes the captive audience notion in theory; certainly it does not generate it in fact.

Apart from *Rowan,* the appellant also invokes *FCC* v. *Pacifica Foundation,* 438 U.S. 726 (1978). There the Court held that the Federal Communications Commission has the power to regulate a radio broadcast of words

---

[7] (Continued)
First Amendment's protection, as it since has been. *See, e.g., Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976). Thus, the *Rowan* Court did not need to confront head on a clash between a protected speech claim and the householder's claim to privacy—a clash present here.

which are indecent, albeit not obscene. While the decision turned in part on the fact that the broadcast of indecent language intruded upon the audience in the privacy of their homes, 438 U.S. at 748-749, the medium of the communication was of overriding importance. "[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *Id.* at 748. Picketing, on the other hand, has traditionally been afforded broad First Amendment protection. *See, e.g., Thornhill* v. *Alabama,* 310 U.S. 88 (1940); *cf. Gregory* v. *City of Chicago,* 394 U.S. 111 (1969). In addition, the Court in *Pacifica Foundation* emphasized the narrowness of its holding and intimated that a similar broadcast presented at a different time of day might lead to a different result. *Id.* at 750.

The theoretical specter of the captive residential audience cannot justify the suppression of virtually all non-labor speech in residential areas. Nor can the privacy interests of homeowners provide constitutionally sufficient warrant for the Illinois statute.

4. Alternative Sites For Picketing, Even If They Existed, Would Not Cleanse The Statute Of Its Unconstitutionality.

One final aspect of the conflict between appellees' right of free speech and residents' privacy interests concerns the possibility of alternative forums for appellees' picketing. It is of course well settled that an appropriate use of streets and sidewalks for the exercise of First Amendment rights cannot be denied or curtailed merely because other sites are available. *Schneider* v. *State,* 308 U.S. 147, 163 (1939). *See also Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546, 556 (1975). Appellant nonetheless suggests that alternative sites are available to

appellees and that this should tip the scales for the claimed right of residential privacy. App. Br., at 20. *Schneider* and its progeny certainly foreclose such an argument. But even assuming *arguendo* that such analysis had some legitimacy, it is off the mark on its own terms here.

The streets and sidewalks of a city can truly be called the "poor man's printing press." *See Martin* v. *City of Struthers,* 319 U.S. 141, 146 (1943). At minimal cost, they provide those who can afford no other means of communication an opportunity to publicize their message. And, it is often those people who are most seriously aggrieved, and whose grievances most deserve publication, who are least able to afford meaningful expression of their complaints. *See* Comment, *Picketing the Homes of Public Officials,* 34 U. Chi. L. Rev. 106, 125 (1966); *cf. Martin* v. *City of Struthers, supra.*

Any suggestion that another part of this forum, away from the mayor's residence, would have been as meaningful for appellees' purposes simply does not square with reality. The only other feasible forum in this case would have been the sidewalk in front of City Hall, in which the office of the mayor of Chicago is located. Yet the public sidewalk in front of the residence of the mayor is both a more meaningful forum and a particularly necessary one. For expression of complaints such as those here to be meaningful, their communication must directly reach both the mayor himself and also the larger audience of citizens of Chicago.

Picketing in front of the mayor's residence can deliver plaintiffs' message to the mayor in a way that picketing in front of City Hall cannot even approximate.

There is a great likelihood that the mayor will not even see picketers or demonstrators in front of City Hall; he is often shepherded into and out of his office by policemen or bodyguards who shield him from seeing any demonstrations. He is generally given little opportunity to see and hear peaceful picketers and their message. He is insulated from the petitions of the poor and the powerless who have no other means of effectively expressing their views to him.

Picketing in front of the mayor's residence, on the other hand, can impress him with the picketers' message in a singular way. The mayor cannot be protected by others from even knowing that complainants exist and that they have serious political and social views which they wish to express to him. Residential picketing allows these dissenters to emphasize to the mayor that his decisions and actions, or his indecision and lack of action, *as a public official,* continue to vitally affect the lives of his constituents even after he has left his formal place of employment. *See* Comment, *Picketers at the Doorstep,* 9 Harv. Civ. Rights-Civ. Lib. L. Rev. 95, 106 (1974); Comment, *Picketing the Homes of Public Officials, supra,* at 126.

In this same vein, picketing in front of the mayor's home is the most effective means by which the speakers can broadcast their message to the citizens of Chicago and perhaps indirectly affect the mayor through them. By picketing at City Hall the picketers can only reach an audience of passers-by whose attentiveness to their message is doubtful at best. After a cursory glance at a picket sign, the passer-by generally forgets in a few moments the message of the sign he has just observed. More importantly, picketing at City Hall will seldom result in any news coverage by the news media. Such

demonstrations are simply too common to generate sufficient news-worthiness. In contrast, picketing at a public official's residence may well warrant media attention, and this in turn means that a great number of citizens will receive news of the picketers' message.

Alternatives aside, there are simply going to be occasions when the home is indeed the only available suitable forum for non-labor picketers. A slumlord, for example, whose daily business is unrelated to the properties he owns, could not be meaningfully picketed by tenants in his buildings at any place other than his residence. Picketing in front of his buildings themselves would never result in the tenants' message being delivered to an absentee landlord. Picketing at his place of employment, assuming that the tenants could determine where that was, would be utterly meaningless because of its lack of relation to the problem. Picketing in front of the slumlord's residence, on the other hand, in perhaps a 'better' part of town, would not only deliver the message of the tenants' grief and advocacy of change to the landlord but also to his neighbors, who may have been unaware of his practices but who may themselves now exert leverage on their neighbor to support the picketers' requests.

In sum, then, the suggestion that picketers have alternative fora, in which to picket, while the householder is a captive audience with nowhere to retreat, is specious.

CONCLUSION

For the foregoing reasons, as well as those set forth in plaintiffs-appellees' brief, the decision of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

HOWARD EGLIT
KAREN POPEK
DAVID GOLDBERGER
Roger Baldwin Foundation of ACLU, Inc. Amicus Curiae.